United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,555

269

DISTRICT OF COLUMBIA,

v.

MARK GRIMES,

Defendant.

On Certification From The District Of Columbia
Court Of General Sessions Pursuant To
D. C. Code, 1967, Section 23-102

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UNITED STATES COURT OF APPEALS
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DISTRICT OF COLUMBIA,

v.

MARK GRIMES,

Defendant.

On Certification From The District Of Columbia
Court of General Sessions Pursuant To
D. C. Code, 1967, Section 23-102

PRELIMINARY STATEMENT

By information filed in the Criminal Division of the Court of General Sessions, defendant was charged with disorderly conduct in violation of § 22-1107, D. C. Code, 1967. In the course of the preliminary proceedings, the authority of the Corporation Counsel to prosecute the offense was challenged. On motion of the Corporation Counsel, the Court of General Sessions, acting pursuant to § 23-102, D. C. Code, 1967, certified to this Court the question of whether the Corporation Counsel or the United States Attorney for the District of Columbia is the proper prosecuting authority for violations of § 22-1107, D. C. Code, 1967.

ARGUMENT

Prosecutions of the offense of disorderly conduct proscribed by § 22-1107, D. C. Code, 1967, should be conducted by the Corporation Counsel.

On July 29, 1892, Congress passed "An Act for the preservation of public peace and the protection of property within the District of Columbia," 27 Stat. 322, ch. 320 (hereinafter referred to as the 1892 Act).

The first seventeen sections of this Act made unlawful a number of more or less unrelated actions, including destroying or defacing public and private buildings and other property; throwing stones or missiles in the street; flying kites; using profane, indecent and obscene language in public; congregating in public places and engaging in loud and boisterous talking; addressing a person for the purpose of prostitution; being a vagrant; indecent exposure; urging dogs to fight or bite persons or animals; molesting or disturbing religious congregations; driving or riding a horse in excess of eight miles per hour; destroying or injuring trees on public space; tying a horse to a tree; setting a fire in the streets; destroying or injuring United States or District of Columbia property; driving or leading animals on footpaths; and playing ball games in the streets.

Section 18 of the 1892 Act, still in full force and effect (§ 22-109, D. C. Code, 1967), provides in pertinent part:

> "That all prosecutions for violations of any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name and for the benefit of the District of Columbia, and in the same manner as now provided by law for the prosecution of offenses against the laws and ordinances of the said District."

The origin of the offense of disorderly conduct, with which this Court is now concerned, may be traced to Sections 5 and 6 of the 1892 Act.[1] As originally proscribed, the offense carried with it a fine of $25. In 1898, Sections 5 and 6 of the 1892 Act were amended in certain particulars not here pertinent and merged into a single section, but the $25 penalty remained unchanged (30 Stat. 723). The only other amendment to Sections 5 and 6 of the 1892 Act occurred in 1953 when Congress increased the penalty from a fine of $25 to a fine of $250 or imprisonment of not more than ninety days, or both. The offense as it now appears in § 22-1107, D. C. Code, 1967, has been consistently prosecuted by the Corporation Counsel throughout the years.

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[1] These sections are set forth in the Appendix.

It is a well known rule of statutory construction that "long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubtful statute." Sutherland, Statutory Construction, Section 5103, 3d Ed. (1943), Vol. 2, Horack.

In suggesting that the Corporation Counsel no longer has authority to prosecute violations of § 22-1107, reliance has been placed on Section 932 of "An Act to establish a code of laws for the District of Columbia," approved March 3, 1901, 31 Stat. 1338, as amended (§ 23-101, D. C. Code, 1967), which provides in pertinent part:

> "Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants.

See dictum in Smith v. District of Columbia, ____ U. S. App. D. C. ____, ____ F. 2d ____ (No. 20,279, decided July 27, 1967).

Clearly, however, such a general provision does not have the effect of impliedly repealing or vitiating the authority of the Corporation Counsel to prosecute the offense of disorderly conduct conferred by the specific terms of Section 18 of the 1892 Act. It is a cardinal rule of statutory construction that repeals by implication are not favored. Only when two statutes are in irreconcilable conflict can it be said that one impliedly repeals the other. Equally settled is the rule of statutory construction that a general statute does not repeal a previously enacted specific statute unless the two enactments are hopelessly inconsistent. Thus, in Washington Ry. & Electric Co. v. District of Columbia, 56 App. D. C. 134, 136, 10 F. 2d 999, this Court said:

> "It is a well-established rule that repeals by implication are not favored, and that a general statute, without negative words, will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent. * * * "

And in Simon v. Simon, 58 App. D. C. 158, 160, 26 F. 2d 530, this Court said:

> "It is a canon of statutory construction that, where there is an earlier special statute and a later general statute, the terms of the later being broad enough to include the matter provided for in the former, the special statute must be considered as an exception to the general statute. * * * "

These principles apply here. A comparison of Section 18 of the 1892 Act with § 23-101, D. C. Code, 1967, which delineates the general prosecutorial authority of the United States Attorney and the Corporation Counsel, will make it abundantly clear that these two statutes are easily reconciled, with the result that the former continues to clothe the Corporation Counsel with undiminished authority to prosecute violations of § 22-1107, supra.

The position of the District of Columbia may be further illustrated by a comparison of the instant case with this Court's holding in United States v. Strothers, 97 U. S. App. D. C. 63, 228 F. 2d 34. In Strothers, the question presented was whether the United States Attorney for the District of Columbia or the Corporation Counsel was the proper prosecuting authority for the offense of soliciting for prostitution, which was originally proscribed by Section 7 of the 1892 Act. From the date of the passage of the 1892 Act until October 15, 1935, the Corporation Counsel prosecuted the offense of soliciting for prostitution under Section 18 of the 1892 Act. On October 15, 1935, the President signed into law an Act entitled "An Act for the suppression of prostitution in the District of Columbia," 49 Stat. 651, in which the scope of the soliciting offense was broadened and in which it was specifically provided that:

> "Section 7 of the Act of Congress entitled 'An Act for the preservation of the public peace and the protection of property within the District of Columbia,' approved July 29, 1892, is hereby repealed."

This Court, accordingly, held that the United States Attorney rather than the Corporation Counsel possessed authority to prosecute the soliciting offense proscribed by the 1935 Act. This Court said (97 U. S. App. D. C. at 66):

> "If, therefore, Section 7 was in fact repealed, as we hold it was, as distinguished from amended, it is obvious that Section 23-101, D. C. Code, 1951, applies. * * * " [Emphasis by the Court.]

In contradistinction to Strothers, the provisions of § 22-1107 have never been repealed but merely amended. This circumstance, as Strothers inferentially makes clear, is not a sufficient basis upon which to predicate a transfer of prosecutorial authority from the Corporation Counsel to the United States Attorney.

The District of Columbia is not unmindful of this Court's holding in District of Columbia v. Moody, 113 U. S. App. D. C. 67, 304 F. 2d 943 (1962). In Moody, this Court, in a short per curiam opinion citing Strothers, supra, as controlling, concluded that the offense of destroying private property created by Section 1 of the 1892 Act, as amended (§ 22-3112, D. C. Code, 1967), was prosecutable by the

United States Attorney for the District of Columbia rather than by the Corporation Counsel. The fact is, however, that the section of the 1892 Act creating the offense of destroying private property, unlike the section involved in Strothers, had never been repealed, but merely amended to increase the penalty. Under these circumstances, the District submits that Strothers does not justify the result reached in Moody, and that the question presented in Moody was incorrectly decided. However, it is not necessary to for this Court to overrule Moody in order to conclude that violations of § 22-1107, supra, should be prosecuted by the Corporation Counsel rather than by the United States Attorney. As will be demonstrated, the legislative history of the disorderly conduct offense here involved differs substantially from that of the offense of destroying private property involved in Moody.

As previously mentioned, the disorderly conduct offense in question was punishable by a fine of $25 until 1953, when, as a result of certain amendments, the penalty was increased to a $250 fine, 90 days imprisonment, or both. Prior to 1953, the Corporation Counsel unquestionably had authority to prosecute this offense under Section 18 of the 1892 Act. Instead of vitiating the Corporation Counsel's authority to prosecute this offense, Congress, by its 1953 amendments, made it crystal clear that such authority was to continue undiminished. Thus,

on the same day it increased the penalty applicable to disorderly conduct under § 22-1107, Congress proscribed the additional kinds of disorderly conduct contained in § 22-1121, D. C. Code, 1967. As is plain from the legislative history of the 1953 amendments, Congress intended to strengthen the existing disorderly conduct laws by creating a more comprehensive statutory scheme similar to that existing in the State of New York. See House of Representatives Report No. 514, 83rd Cong., 1st Sess., pp. 8, 9.

Consistent with increasing the penalty applicable to § 22-1107, Congress also made the disorderly conduct proscribed by § 22-1121 punishable by a fine of not more than $250, or imprisonment for not more than 90 days, or both. Notwithstanding this penalty, Congress then specifically provided that prosecutions of § 22-1121 shall be conducted in the name of and for the benefit of the District of Columbia (67 Stat. 98). It is not without significance that Congress did so by amending Section 18 of the 1892 Act, the very provision which the District contends should control here. All doubt concerning the authority of the Corporation Counsel to prosecute both kinds of disorderly conduct, whether under § 22-1107 or under § 22-1121, was laid to rest by the legislative history of the 1953 disorderly conduct amendments. Thus, after noting that the "punishment by imprisonment" added to § 22-1107

United States Attorney for the District of Columbia rather than by the Corporation Counsel. The fact is, however, that the section of the 1892 Act creating the offense of destroying private property, unlike the section involved in Strothers, had never been repealed, but merely amended to increase the penalty. Under these circumstances, the District submits that Strothers does not justify the result reached in Moody, and that the question presented in Moody was incorrectly decided. However, it is not necessary to for this Court to overrule Moody in order to conclude that violations of § 22-1107, supra, should be prosecuted by the Corporation Counsel rather than by the United States Attorney. As will be demonstrated, the legislative history of the disorderly conduct offense here involved differs substantially from that of the offense of destroying private property involved in Moody.

As previously mentioned, the disorderly conduct offense in question was punishable by a fine of $25 until 1953, when, as a result of certain amendments, the penalty was increased to a $250 fine, 90 days imprisonment, or both. Prior to 1953, the Corporation Counsel unquestionably had authority to prosecute this offense under Section 18 of the 1892 Act. Instead of vitiating the Corporation Counsel's authority to prosecute this offense, Congress, by its 1953 amendments, made it crystal clear that such authority was to continue undiminished. Thus,

on the same day it increased the penalty applicable to disorderly conduct under § 22-1107, Congress proscribed the additional kinds of disorderly conduct contained in § 22-1121, D. C. Code, 1967. As is plain from the legislative history of the 1953 amendments, Congress intended to strengthen the existing disorderly conduct laws by creating a more comprehensive statutory scheme similar to that existing in the State of New York. See House of Representatives Report No. 514, 83rd Cong., 1st Sess., pp. 8, 9.

Consistent with increasing the penalty applicable to § 22-1107, Congress also made the disorderly conduct proscribed by § 22-1121 punishable by a fine of not more than $250, or imprisonment for not more than 90 days, or both. Notwithstanding this penalty, Congress then specifically provided that prosecutions of § 22-1121 shall be conducted in the name of and for the benefit of the District of Columbia (67 Stat. 98). It is not without significance that Congress did so by amending Section 18 of the 1892 Act, the very provision which the District contends should control here. All doubt concerning the authority of the Corporation Counsel to prosecute both kinds of disorderly conduct, whether under § 22-1107 or under § 22-1121, was laid to rest by the legislative history of the 1953 disorderly conduct amendments. Thus, after noting that the "punishment by imprisonment" added to § 22-1107

was "entirely new," the report of the House District Committee went on to state its enforcement proposals for its revamped disorderly conduct offenses as follows:

> "Section 211(b) * * * [of the District of Columbia Law Enforcement Act of 1953] amends section 18 of the act of July 29, 1892 (D. C. Code, sec. 22-109), so as to provide that violations of the new section 211 shall be prosecuted in the name of the District * * * ." Reports and Documents Relating to D. C., 83rd Cong., 1953-54, p. 9.

In short, it is utterly inconceivable that Congress would proscribe new kinds of disorderly conduct, punishable by a fine, imprisonment, or both, and specifically authorize the Corporation Counsel to prosecute offenses thereunder, and, on the same day, increase the penalty for the existing kinds of disorderly conduct to a fine, imprisonment, or both, and not intend that the Corporation Counsel be the prosecuting officer for both offenses. Whatever may be said concerning the offense of destroying private property, therefore, a consideration of the statutes proscribing disorderly conduct in their totality, together with supporting legislative history, will render inescapable the conclusion that the Corporation Counsel is the proper prosecuting authority for violations of § 22-1107, D. C. Code, 1967.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the offense of disorderly conduct in violation of § 22-1107, D. C. Code, 1967, should continue to be prosecuted by the Corporation Counsel for the District of Columbia.

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Washington, D. C. 20004

STATUTE INVOLVED

Act for the preservation of the public peace and the protection of property within the District of Columbia. Approved July 29, 1892, 27 Stat. 322, ch. 320.

* * * * * *

Sec. 5. That it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or any indecent or obscene words, or engage in any disorderly conduct in any street, avenue, public space, square, road, or highway, or at any railroad depot or steamboat landing within the District of Columbia, or in any place wherefrom the same may be heard in any such street, avenue, alley, public square, road, highway, or in any such depot, railroad cars, or on board any steamboat, under a penalty of not exceeding twenty dollars for each and every such offense.

Sec. 6. That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble at the corners of any of the streets or avenues, or in any street, avenue, or alley, road, or highway, or on the foot pavements or flag footways of any street or avenue, or at the entrance or on the steps, cellar doors, porches, or porticos of any public or private building or office, or at the entrance of any public or private building or office, or at the entrance, or in, or around any of the inclosures of the Capitol, Executive Mansion, public squares, District buildings, Judiciary square, or at the entrance of any church, schoolhouse, theater, or any assembly room, or in or around the same or any other public or private inclosure within the said District, and be engaged in loud or boisterous talking, or to insult or make rude or obscene comments or remarks or observations on persons passing by the same, or in their hearing, or to so crowd, obstruct, or incommode the

said foot pavement or flag footway, or the entrance into or out of any such church, public or private dwelling, city hall, Executive Mansion, Capitol, or such public inclosure, square or alley, highway or road, as to prevent the free and uninterrupted passage thereof, under a penalty of not more than twenty-five dollars for each and every such offense.

* * * * * *

BRIEF FOR DEFENDANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,555

DISTRICT OF COLUMBIA

v.

MARK GRIMES

ON CERTIFICATION FROM THE DISTRICT OF
COLUMBIA COURT OF GENERAL SESSIONS,
PURSUANT TO D.C. CODE, 1967, § 23-102

DAVID NIBLACK,
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Washington, D.C.

LAWRENCE H. SCHWARTZ
424 Fifth Street, N. W.
Washington, D. C. 20001

(Appointed by the D.C. Court
of General Sessions)

QUESTION PRESENTED

Whether a prosecution for violation of D.C. Code, 1967, §22-1107 "Unlawful Assembly - Profane and Indecent Language" shall be conducted in the name of the District of Columbia and by the Corporation Counsel or his assistants, or shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants.

I N D E X

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,555

DISTRICT OF COLUMBIA

v.

MARK GRIMES

ON CERTIFICATION FROM THE DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS, PURSUANT TO D.C. CODE, 1967, § 23-102

BRIEF FOR DEFENDANT

PRELIMINARY STATEMENT

By informations filed in the Criminal Division of the Court of General Sessions, defendant was charged with disorderly conduct in violation of § 22-1107, D.C. Code, 1967. In the course of the proceedings the authority of the Corporation Counsel to prosecute the offense was challenged. For this reason, the Honorable Tim Murphy of the Court of General Sessions, acting pursuant to § 23-102, D.C. Code, 1967, certified to this Court the question whether the Corporation Counsel or the United States Attorney for the District of Columbia is the proper prosecuting authority for violations of § 22-1107, D.C. Code, 1967.

STATEMENT OF THE CASE

On December 15, 1967, the defendant, Mark Grimes, was charged by information (No. D.C. 16940-67) in the District of Columbia Court of General Sessions with the crime of disorderly conduct in violation of D.C. Code § 22-1107 (1967 Edition). The information, brought by the Corporation Counsel of the District of Columbia, charges in pertinent part that:

> "Mark Grimes late of the District of Columbia aforesaid, on or about the 14th day of December in the year A.D. nineteen hundred and sixty-seven, in the District of Columbia, aforesaid, and on 443 Orange Street, Avenue, north, south, west, east and in a private house, did then and there engage in disorderly conduct; to wit: in a place wherefrom the same could be heard in said highway and in premises other than where the offense was committed, did engage in loud and boisterous talking and other disorderly conduct, contrary to and in violation of an act of Congress in such case made and provided, and constituting a law in the District of Columbia."

When the case was called for arraignment, present co-counsel were appointed by the Honorable Tim Murphy, who was presiding over the District of Columbia Branch of the Criminal Division of the Court of General Sessions. No court reporter was present, nor was a request made for one.

After interviewing the defendant who is 18 years old, his mother, and the arresting officer, counsel indicated to the Court that there might be some question of the defendant's competency to stand trial. Because of the relatively slight sentence that can be imposed for disorderly conduct, and the available facilities in the District of Columbia counsel stated that it might well be a disservice to the defendant to move for pre-trial mental observation pursuant to D.C. Code § 24-301(a). A notation to this effect was made on the information.

The Court then made an independent inquiry of the defendant, his mother and the arresting officer, after which he ordered the defendant committed to the District of Columbia General Hospital for mental observation pursuant to D.C. Code § 24-301(a). The case was then continued until January 18, 1968 for consideration of the Hospital report.

On January 11, 1968, D.C. General Hospital, per Dr. Maurice C. Corbin, reported in a letter to the Clerk of the Court of General Sessions that the defendant was not suffering "from a mental disease or defect" and "is competent to stand trial in that he understands the nature of his charges and is capable of properly assisting counsel in his defense."

On January 18, 1968, counsel for defendant did not contest the hospital report and the Court released defendant on his personal recognizance.

Defense counsel then asked the Assistant Corporation Counsel present in the Courtroom whether the Government was proceeding under D.C. Code § 22-1107 or § 22-1121. The Assistant Corporation Counsel replied that the charge against the defendant was based upon § 22-1107.[1/]

On December 27, 1967, co-counsel for defendant moved to dismiss the information on the ground that the Corporation Counsel lacked authority to prosecute the charge, citing Smith v. District of Columbia, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 20,279 decided July 27, 1967) the Corporation Counsel moved in response that the case be certified to the United States Court of Appeals for the District of Columbia Circuit pursuant to D.C. Code § 23-102 (1967 ed.) for a determination whether a prosecution under § 22-1107 should be by the Corporation Counsel or by the United States Attorney for the District of Columbia.

1/ There is no indication on the information as to which disorderly conduct statute the defendant is charged.

On January 4, 1968, the Court granted the Corporation Counsel's motion and reserved ruling on the defense motion to dismiss. This certification followed.

STATUTES INVOLVED

Act of July 29, 1892 (27 Stat. 323) provided in pertinent part:

> Section 5. That it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or any indecent or obscene words, or engage in any disorderly conduct in any street, avenue, public space, square, road, or highway, or at any railroad depot or steamboat landing within the District of Columbia, or in any place wherefrom the same may be heard in any such street, avenue, alley, public square, road, highway, or in any such depot, railroad cars, or on board any steamboat, under a penalty of not exceeding twenty dollars for each and every such offense.
>
> Section 6. That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble at the corners of any of the streets or avenues, or in any street, avenue, or alley, road, or highway, or on the foot pavements or flag footways of any street or avenue, or at the entrance or on the steps, cellar doors, porches, or porticos of any public or private building or office, or at the entrance or in, on, or around any of the inclosures of the Capitol, Executive Mansion, public squares, District buildings, Judiciary square, or at the entrance of any church, schoolhouse, theater, or assembly room, or in or around the same, or any other public or private inclosure within the said District, and be engaged in loud or boisterous talking, or to insult or make rude or obscene comments or remarks or observations on persons passing by the same, or in their hearing, or to so crowd, obstruct, or incommode the said foot pavement or flag footway, or the entrance into or out of any such church, public or private dwelling, city hall, Executive Mansion, Capitol, or such public inclosure, square or alley, highway or road, as to prevent the free and uninterrupted passage thereof, under a penalty of not more than twenty-five dollars for each and every such offense.

Section 18. That all prosecutions for violations of any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as now provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of any of the provisions of this act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the workhouse in the District of Columbia for a term not exceeding six months for each and every offense.

Act of July 8, 1898 (30 Stat. 723) provided in pertinent part:

That an Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia," approved July twenty-ninth, eighteen hundred and ninety-two, be, and the same is hereby, amended to read as follows:

* * *

That said Act be further amended by striking out sections five and six and inserting in lieu thereof the following:

"That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; that it shall not be lawful for any person or persons to curse, swear, or

make use of any profane language or indecent or obscent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than twenty-five dollars for each and every such offanse."

Act of June 29, 1953 (67 Stat. 97) provided in pertinent part:

Section 210. Section 6 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia", approved July 29, 1992, as amended (D.C. Code, Sec. 22-1107, relating to unlawful assembly, profane and indecent language), is amended by striking out "twenty-five dollars" and inserting in lieu thereof "$250 or imprisonment for not more than ninety days, or both".

Section 211. (a) Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby,

(1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(2) congregates with others on a public street and refuses to move on when ordered by the police;

(3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

(4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than ninety days, or both.

(b) Section 18 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia", approved July 29, 1892 (D.C. Code, sec. 22-109), is amended by inserting "section 211 of the District of Columbia Law Enforcement Act of 1953 or" after "violations of" and after "convicted of any violation of".

Title 22, District of Columbia Code, Section 109, provides:

All prosecutions for violations of section 22-1121 or any of the provisions of any of the laws or ordinances provided for by this Act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of section 22-1121 or any of the provisions of this Act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the workhouse of the District of Columbia for a term not exceeding six months for each and every offense. The second sentence of this section shall not apply with respect to any violation of section 22-1112(b). (July 29, 1829, 27 Stat. 325, ch. 320, § 18; June 29, 1953, 67 Stat. 93, 98, ch. 159, §§ 202(a)(2), 211(b).)

Title 22, District of Columbia Code, Section 1107, provides:

> It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road or highway, or in or around any public building or inclosure, or any park or reservations, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every offense. (July 29, 1892, 27 Stat. 323, ch. 320, § 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159, § 210)

Title 22, District of Columbia Code, Section 1121, provides:

> Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby
>
> (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> (2) congregates with others on a public street and refuses to move on when ordered by the police;

(3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

(4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than ninety days, or both. (June 29, 1953, 67 Stat. 98, ch. 159, § 211(a).)

Title 23, District of Columbia Code, Section 101, provides:

The attorney for the District of Columbia shall be known as the corporation counsel.

Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the Attorney of the United States for the District of Columbia or his assistants. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 932; June 30, 1902, 32 Stat. 537, ch. 1329).

Title 23, District of Columbia Code, Section 102, provides:

If in any case any question shall arise as to whether under section 23-101 the prosecution should

be conducted by the corporation counsel or by the attorney of the United States for the District of Columbia, the presiding justice shall forthwith, either of his own motion or upon suggestion of the corporation counsel or the attorney of the United States, certify the case to the United States Court of Appeals for the District of Columbia, which court shall hear and determine the question in a summary way. In every such case the defendant or defendants shall have the right to be heard in the United States Court of Appeals for the District of Columbia. The decision of such court shall be final.

SUMMARY OF THE ARGUMENT

Section 23-101 of the District of Columbia Code, 1967 states that the United States Attorney for the District of Columbia shall prosecute all penal statutes, etc. where the maximum punishment is more than a fine, or imprisonment for more than one year. This statute determines who shall prosecute Section 22-1107 violations and supercedes Section 22-109, because Section 22-1107 was amended in 1953 to provide a maximum punishment of fine and imprisonment. This legislative history as well as the general scheme of legislative intent dictates that Congress intended that the United States Attorney prosecute Section 22-1107 violations.

The consistent case law rule in the District of Columbia is that absent a specific exception, the prescribed maximum punishment at the time of prosecution determines who shall prosecute. This construction of the material statutory provisions has been made by this Court as recently as July 27, 1967 in Smith v. District of Columbia (No. 26,279) ___U.S. App. D.C. ___. This case law construction applied to the question in this certification dictates that the United States Attorney prosecute Section 22-1107 violations.

ARGUMENT I

THE PLAIN WORDING AND LEGISLATIVE HISTORY RELATED TO SECTION 22-1107 OF THE DISTRICT OF COLUMBIA CODE (DISORDERLY CONDUCT) CLEARLY DICTATE THAT CONGRESS INTENDED THAT THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA PROSECUTE CASES ARISING UNDER THAT SECTION.

This certification to this Court, pursuant to D.C. Code § 23-102 (1967),[2/] concerns the proper prosecutorial authority under D.C. Code § 22-1107 (1967), which forbids certain acts constituting disorderly conduct.

Section 22-1107 of the D.C. Code has its origin in Section Five and Six of "An Act for the Preservation of Public Peace and the Protection of Property" which became law in the District of Columbia on July 29, 1892.[2/]

This Act enumerated several criminal offenses and prescribed penalties in the form of fines ranging from five dollars[3/] to $250.[4/] None of the offenses carried imprisonment as a direct penalty. Section 18 of the 1892 Act

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2/ Act of March 3, 1901, ch. 854, § 933, 31 Stat. 1341, as amended, Act of June 30, 1902, ch. 1329, 32 Stat. 537; Act of June 7, 1934, ch. 426, 48 Stat. 926.

3/ Ch. 320, 27 Stat. 322.

4/ Throwing stones; causing dogs to fight; playing football, bandy, shindy or other ball games in streets. All of the above are currently in effect in the District of Columbia with the same penalty. See, D.C. Code §§ 22-1109, 22-1110, 22-1108 respectively.

5/ Indecent exposure.

provided for imprisonment only upon failure to pay the prescribed fine. This same section stated that all prosecutions for violations of the Act should be in the name of the District of Columbia.[6/]

On July 8, 1898, Sections Five and Six of the 1892 Act were stricken and a new statute was enacted.[7/] This new provision carried more substantive amendments of the language of Sections Five and Six and increased the penalty for a violation of the matters contained in Section Five from twenty dollars to twenty-five dollars, so that all types of disorderly conduct carried a penalty of a twenty-five dollar fine. This statute, which is now D.C. Code § 22-1107 (1967), remained unchanged until June 29, 1953.

On March 3, 1901, the laws of the District of Columbia were codified.[8/] That Act provided that all laws in effect at the time of the passage of the Act would remain in force unless "inconsistent with or replaced by" the new Code. Nothing in this codification affected the 1898 version of the statute.

6/ Section 18 of the 1892 Act is the precursor of the current Section 22-1109 of the D.C. Code (1967 Ed.).

7/ Ch. 638, 30 Stat. 723.

8/ Section One, 31 Stat. 1189.

Section 932 of the 1901 codification provided that all criminal prosecutions where the maximum penalty was a fine only or imprisonment not exceeding one year should be in the name of the District of Columbia and by the then city solicitor.[9/] All other prosecutions, according to Section 932, were to be in the name of the United States and by the United States Attorney. This statute is currently in effect as D.C. Code § 22-101.

On June 29, 1953, the "District of Columbia Law Enforcement Act of 1953" became law.[10/] This Act did three things relevant to this case.

1. Section 211(a) created a category of disorderly conduct offenses entirely separate from and in addition to the provisions contained in the 1898 Act. The maximum penalty under this new statute was set at a fine of $250, imprisonment for 90 days, or both. This Section is codified as Section 22-1121 of the D.C. Code (1967 Ed.).

2. Section 211(b) amended Section 18 of the 1892 Act by specifically providing that prosecutions under Section 211(a) of the 1953 Act would be in the name of and

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9/ In 1902 "city solicitor" was changed to "corporation counsel." 32 Stat. 537.

10/ Ch. 159, 67 Stat 90.

for the benefit of the District of Columbia. The amended Section 18 of the 1892 Act is now in effect as D.C. Code § 22-109 (1967 ed.). This has been interpreted as vesting prosecutorial authority for D.C. Code § 22-1121 in the corporation counsel.

3. Section 210 amended the 1898 statute (D.C. Code § 22-1107) to increase the maximum penalty from a $25 fine only to a fine of $250, imprisonment for 90 days, or both. There was no provision in the 1953 act concerning prosecutorial authority under Section 210.

There is nothing in the legislative history of any of the above statutes, or indeed, in any District of Columbia statute, that would indicate that it was the intent of Congress that the Corporation Counsel should prosecute Section 22-1107 violations. Indeed, the opposite is true. In at least 39 places in the District of Columbia Code Congress provides for punishments of fine and imprisonment and specifically authorizes the District of Columbia Corporation Counsel to prosecute.[11/] It is significant that none of the statutory provisions in the Appendix were enacted prior to March 3, 1901, when Section 23-101 of the D.C. Code

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11/ See Appendix A for a list.

became law. This pattern of legislative action is some indication that Congress is aware of § 23-101 when it legislates and specifically authorizes Corporation Counsel prosecution when it so intends.

In this case it is clear that the Congress was aware of § 23-101 when it changed the punishment for § 22-1107 violation to fine and imprisonment. In the same Act on June 29, 1953,[12/] they specifically exempted Section 22-1121 from the operation of § 23-101 in Section 22-109. Are we to assume that Congress committed an oversight in 1953 and assert, as does the government, that Congress really intended to have the Corporation Counsel prosecute both § 1107 and § 1121 disorderly cases? Or, must we look to the plain words of the statutes involved and accept the plain conclusion of those words that Congress in 1953 was aware of the 1901 law (Section 23-101) and intended that the special exception of Section 22-1121 (Section 22-109) should not also apply to Section 22-1107.

12/ 67 Stat. 90, Ch. 1159.

ARGUMENT II

THE CONSISTENT CASE LAW RULE IN THE DISTRICT OF COLUMBIA—HOLDING THAT, ABSENT SPECIFIC STATUTORY EXCEPTION, THE PRESCRIBED MAXIMUM PUNISHMENT AT THE TIME OF PROSECUTION DETERMINES WHO SHALL BE THE PROSECUTOR—REQUIRES THAT THE UNITED STATES ATTORNEY PROSECUTE VIOLATIONS ARISING UNDER § 22-1107 OF THE DISTRICT OF COLUMBIA CODE.

In the District of Columbia v. Simpson, 40 App. D.C. 498 (1913), the Court held that the Corporation Counsel "has no authority to prosecute offenses where the maximum punishment may be both a fine and imprisonment". (40 App. D.C. 498,500). In that case the question certified to the Court of Appeals involved Section 878(c) of the District Code, which prohibited "the refilling with milk, cream or other beverage, with intent to sell the same, any vessel registered by another". The Court went on to say:

> If it is deemed advisable to have such prosecutions (for violations of Sec. 878(c) conducted by the Corporation Counsel or his assistants, congressional action must be sought. We must take the statutes as we find them. 40 App. D.C., 498, 500.

Thus, in United States v. Strothers, 97 U.S. App. D.C. 63, 228 F.2d 34 (1955), this Court affirmed the procedure where the United States Attorney prosecuted "soliciting for prostitution" cases, 22 D.C. 2701. The Corporation Counsel had prosecuted the predecessor to 22 D.C. Code § 2701,

Section 7 of the Act of July 29, 1892. After the Act of August 15, 1935, however, which increased the maximum penalty from $50 to $100 or ninety days, or both, prosecutions were by the United States Attorney.

> In view of the fact that the penalty prescribed by the 1935 Act as amended is a fine or imprisonment or both, the prosecution is to be conducted by the United States Attorney, unless the Corporation Counsel has been specifically authorized to do so. As heretofore indicated, no such specific authority has been given (328 F.2d 34, 37) (emphasis supplied)

District of Columbia v. Moody, 113 U.S. App. D.C. 67, 304 F.2d 943 (1962), involved a prosecution for destroying private property, D.C. Code 22-3112, which provides a maximum punishment of a $100 fine, or six months imprisonment, or both. This Court held that the prosecution "must be conducted by the United States Attorney for the District of Columbia". The result in this case follows, a fortiori from the holding in Moody. Moody further demonstrates the inapplicability of 22-109 to this case.

Section 22-109 provides in pertinent part:

> All prosecutions for violations of section 22-1121 or any of the provisions of any of the laws or ordinances provided for by this Act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District...

The "Act" referred to in Section 22-109 is the Act of July 29, 1892, c. 320, 27 Stat. 322, the predecessor of Section 22-109 being enacted by the Act of March 3, 1901, c. 854, 32, 31 Stat. 1340. The predecessor of Section 22-1107 is also in the 1892 statute, Sec. 5 25 Stat. 323. The predecessor however, of the present Section 22-3112, the section involved in Moody, is also in the 1892 statute, Sec. 1, 27 Stat. 322. If only Section 22-109 were to be considered, prosecutions under 22-3112 should be by the Corporation Counsel, but Moody holds squarely to the contrary. The reason is that 22-3112 was amended in 1906. The maximum punishment prescribed for a violation was changed from a fine only to what now appears, a fine or imprisonment or both. This Court in Moody was aware of this change, because it observed that Section 22-3112 is "presently punishable" by fine or imprisonment or both. Moody, therefore, stands for the proposition that the prescribed maximum punishment at the time of prosecution determines who is the proper prosecutor, notwithstanding Section 22-109.[13/]

13/ The same is true of United States v. Strothers, supra. The predecessor of the statute involved there, D.C. Code 22-2701, also in the 1892 statute, Sec. 7, 27 Stat. 323, and it also originally provided for a fine only, but it was

Thus, in the District of Columbia, the general rule is that, as this Court said as recently as July 27, 1967,

> Where the maximum punishment may be both a fine and imprisonment the corporation counsel has no authority to prosecute.
> Smith v. District of Columbia, No. 20279, slip op. at 2 (D.C. Cir., July 27, 1967)

Accordingly, in view of Section 23-101 and the maximum punishment prescribed for violation of Section 22-1107, "the corporation counsel has no authority to prosecute" for violations of that section.

The government may also contend that because the Corporation Counsel may prosecute cases of disorderly conduct under Section 22-1121--as he may, in view of the specific language of Section 22-109--he should also have authority to prosecute disorderly conduct cases under Section 22-1107. The difficulty with this argument is that it ignores the pertinent statutory language and the square holdings of this Court in Moody and Strothers. Section 22-109 contains, in its reference to Section 22-1121, an express exemption from Section 23-101. There is no exemption for 22-1107 from 23-101. As this Court said in Smith v. District of Columbia, supra, slip op. at 4, referring to

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rewritten and the maximum punishment changed to fine or imprisonment or both in 1935, Act of August 15, 1935, ch. 546, 49 Stat. 651, and prosecution must be by the U.S. Attorney.

Section 22-1107:

So far as we are advised, there is no specific exemption of this section from the requirements of 23-101, such as was provided in respect to Section (22-)1121.

CONCLUSION

WHEREFORE, it is respectfully submitted that prosecution of defendant for violation of 22 D.C. Code § 1107 should be conducted by the United States Attorney for the District of Columbia.

Respectfully submitted,

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1633 Connecticut Avenue, N. W.
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Counsel for Defendant
(Appointed by the Court of
General Sessions

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been mailed postage prepaid, to the Corporation Counsel for the District of Columbia and delivered personally to the United States Attorney for the District of Columbia, U.S. District Courthouse, Washington, D. C.

LAWRENCE H. SCHWARTZ

APPENDIX

Following is a selection of the many statutory provisions authorizing the District of Columbia Corporation Counsel to prosecute crimes for which both a fine and imprisonment are provided. Like Section 22-109 of the D.C. Code (1967 ed.), some of these provisions state that prosecution shall be in the name of the District of Columbia but do not specifically name the Corporation Counsel. It is significant that none of the below listed provisions were enacted prior to March 3, 1901, when Section 23-101 of the D.C. Code became law.

Violation of Statute Relating To	Maximum Penalty	D.C.Code Section 1967 ed.	Statute-At Large
Cemeteries and Crematories	200/90 days	27-127	31 Stat. 1289(190.
Dead Human Bidies	100/1 yr.	2-209	32 Stat. 175(1902
General Licensing	300/90 days	47-2347	32 Stat. 628(1902
Insanitary Buildings	100/90 days	5-631	34 Stat. 161(1906 68 Stat. 889(1963
Pharmacies	200/6 mos.	2-616	34 Stat. 182(1906
Veterinarians	200/6 mos.	2-812	34 Stat. 873(1907
Hospitals	200/30 days	32-305	35 Stat. 65(1908)
Money Lender	200/30 days	26-607	37 Stat. 659(191.

Public Auction	200/60 days	47-2207	39 Stat. 847 (1916)
Industrial Safety	300/90 days	36-442	40 Stat. 961 (1918) 55 Stat. 738 (1941)
Minimum Wages	10,000/6 mos.	36-414	40 Stat. 963 (1918)
Weights and Measures	500/6 mos.	10-134	41 Stat. 1225 (1921)
Optometrists	1000/yr.	2-502	43 Stat. 177 (1924) *79 Stat. 1308 (1965)
Dairy Production	500/30	33-319	43 Stat. 1008 (1925)
Renovation and Sale of Matresses	500/6 mos.	6-605	44 Stat. 839 (1926)
Practice of Architecture	200/1 yr.	2-1030	45 Stat. 953 (1928)
Books & Records of Insurance Corp.	300/90 days	35-204	47 Stat. 158 (1932)
Alcoholic Beverages	1,000/1 yr.	25-132	48 Stat. 336 (1934)
Boilers	100/90 days	1-714	49 Stat. 1917 (1936)
Motor Vehicles Registration	300/30 days	40-104	50 Stat. 682 (1937)
Real Estate and Business Brokers	500/6 mos.	45-1416	50 Stat. 797 (1937)
Cosmetology	300/6 mos.	2-1327	52 Stat. 619 (1938)
Communicable Disease	300/90	6-119h	53 Stat. 1408 (1939) 60 Stat. 919 (1946)
Making of False Statement concern-	500/1 yr.	40-714	54 Stat. 739 (1940)
ing Automobile liens	500/1 yr.	40-714	
Vagrancy	300/90 days	22-3305	55 Stat. 810 (1941)

Black-outs in War Time	300/90	6-1010	55 Stat. 860 (1941)
Child Placing Agency Without License	300/90 days	32-788	58 Stat. 195 (1944)
Boxing	1000/1 yr.	2-1224	58 Stat. 826 (1944)
Secrecy Breach by District Employees	1000/6 mos.	47 1564e	61 Stat. 342 (1947)
General D.C. Taxes	5000/1 yr.	47-1589e	61 Stat. 357 (1947)
Sales Taxes	500/6 mos.	47-2627	63 Stat. 124 (1949)
Cigarette Tax	1000/1 yr.	47-2810	63 Stat. 139 (1949)
Charitable Solicitations	500/60 days	2-2112	71 Stat. 281 (1957)
Fish and Game	300/90 days	22-1631	72 Stat. 815 (1958)
Practical Nurses	300/90 days	2-437	74 Stat. 807 (1960)
Physical Therapists	500/1 yr.	2-467	75 Stat. 582 (1961)
Public Welfare	500/90 days	3-212	76 Stat. 917 (1962)
Disclosure of Juvenile Court Records	100/90 days	11-1586d	77 Stat. 501 (1963)
Public Accountants	500/1 yr.	2-926	80 Stat. 792 (1966)

*Amended statute to authorize Corporation Counsel to prosecute.

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BRIEF FOR UNITED STATES OF AMERICA
AMICUS CURIAE

No. 21,555

By order of Acting Chief Judge Danaher the motion of counsel for the United States for leave to have the attached brief treated as its brief in 21,555 was granted.

BRIEF FOR UNITED STATES OF AMERICA
AMICUS CURIAE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,311 ~~& 21,312~~ 12-13 and 21,314

DISTRICT OF COLUMBIA

v.

MARION BARRY, JR., ET AL.

— are these cases pending before another panel? No — dismissed for mootness.

BRIEF IN RESPONSE TO QUESTION CERTIFIED BY
DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
LAWRENCE LIPPE,
Assistant United States Attorneys,
For United States of America Amicus Curiae.

QUESTION PRESENTED

Whether a prosecution for using profane language, indecent and obscene words and engaging in loud and boisterous talking and other disorderly conduct, in violation of Section 22-1107 of the District of Columbia Code, should be conducted by the United States, or by the Corporation Counsel, in the name of and for the benefit of the District of Columbia.

I N D E X

TABLE OF CASES

OTHER REFERENCES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,311 - 21,314

DISTRICT OF COLUMBIA

v.

MARION BARRY, JR., ET AL.

BRIEF IN RESPONSE TO QUESTION CERTIFIED BY
DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

BRIEF FOR UNITED STATES OF AMERICA
AMICUS CURIAE

STATEMENT OF THE CASE

By separate informations filed by the Corporation Counsel for the District of Columbia in the Court of General Sessions, Messrs. Marion S. Barry, Jr., et al. were charged with disorderly conduct in violation of Section 22-1107, District of Columbia Code.

On September 1, 1967, upon motion by defendants, the trial court dismissed each of the informations on the ground, inter alia, that the prosecutions should have been conducted by the United States. On September 20, 1967, the trial court, upon motion by the Corporation Counsel, vacated that portion of its dismissal order which dealt with prosecutional authority and

certified the question to this Court under the provisions of Section 23-102, District of Columbia Code.

STATUTES INVOLVED

Act of July 29, 1892 (27 Stat. 323) provided in pertinent part:

> Section 5. That it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or any indecent or obscene words, or engage in any disorderly conduct in any street, avenue, public space, square, road, or highway, or at any railroad depot or steamboat landing within the District of Columbia, or in any place wherefrom the same may be heard in any such street, avenue, alley, public square, road, highway, or in any such depot, railroad cars, or on board any steamboat, under a penalty of not exceeding twenty dollars for each and every such offense.
>
> Section 6. That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble at the corners of any of the streets or avenues, or in any street, avenue, or alley, road, or highway, or on the foot pavements or flag footways of any street or avenue, or at the entrance or on the steps, cellar doors, porches, or porticos of any public or private building or office, or at the entrance of any public or private building or office, or at the entrance, or in, on, or around any of the inclosures of the Capitol, Executive Mansion, public squares, District buildings, Judiciary square, or at the entrance of any church, schoolhouse, theater, or any assembly room, or in or around the same, or any other public or private inclosure within the said District, and be engaged in loud or boisterous talking, or to insult or make rude or obscene comments or remarks or observations on persons passing by the same, or in their hearing, or to so crowd, obstruct, or incommode the said foot pavement or flag footway, or the entrance into or out of any such church, public or private dwelling, city hall, Executive Mansion, Capitol, or such public inclosure, square or alley, highway or road, as to prevent the free and uninterrupted passage thereof, under a penalty of not more than twenty-five dollars for each and every such offense.
>
> Section 18. That all prosecutions for violations of any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as now provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of any of the provisions of this act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the workhouse in the District of Columbia for a term nor exceeding six months for each and every offense.

Act of July 8, 1898 (30 Stat. 723) provided in pertinent part:

> That an Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia," approved July twenty-ninth, eighteen hundred and ninety-two, be, and the same is hereby, amended to read as follows: * * *
>
> That said Act be further amended by striking out sections five and six and inserting in lieu thereof the following:
>
> "That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; that it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than twenty-five dollars for each and every such offense."

Act of June 29, 1953 (67 Stat. 97) provided in pertinent part:

> Section 210. Section 6 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia", approved July 29, 1892, as amended (D.C.Code, sec. 22-1107, relating to unlawful assembly, profane and indecent language), is amended by striking out "twenty-five dollars" and inserting in lieu thereof "$250 or imprisonment for not more than ninety days, or both".
>
> Section 211. (a) Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby,-

(1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(2) congregates with others on a public street and refuses to move on when ordered by the police;

(3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

(4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than ninety days, or both.

(b) Section 18 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia", approved July 29, 1892 (D.C. Code, sec. 22-109), is amended by inserting "section 211 of the District of Columbia Law Enforcement Act of 1953 or" after "violations of" and after "convicted of any violation of".

Title 22, District of Columbia Code, Section 109, provides:

All prosecutions for violations of section 22-1121 or any of the provisions of any of the laws or ordinances provided for by this Act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of section 22-1121 or any of the provisions of this Act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the workhouse of the District of Columbia for a term not exceeding six months for each and every offense. The second sentence of this section shall not apply with respect to any violation of section 22-1112 (b). (July 29, 1892, 27 Stat. 325, ch. 320, § 18; June 29, 1953, 67 Stat. 93, 98, ch. 159, §§ 202 (a)(2), 211 (b).)

Title 22, District of Columbia Code, Section 1107, provides:

> It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservations, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every such offense. (July 29, 1892, 27 Stat. 323, ch. 320, § 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159, § 210.)

Title 22, District of Columbia Code, Section 1121, provides:

> Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby -
>
> (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> (2) congregates with others on a public street and refuses to move on when ordered by the police;
>
> (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;
>
> (4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than ninety days, or both. (June 29, 1953, 67 Stat. 98, ch. 159, § 211a.)

Title 23, District of Columbia Code, Section 101, provides:

The attorney for the District of Columbia shall be known as the corporation counsel.

Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 932; June 30, 1902, 32 Stat. 537, ch. 1329.)

Title 23, District of Columbia Code, Section 102, provides:

If in any case any question shall arise as to whether under section 23-101 the prosecution should be conducted by the corporation counsel or by the attorney of the United States for the District of Columbia, the presiding justice shall forthwith, either of his own motion or upon suggestion of the corporation counsel or the attorney of the United States, certify the case to the United States Court of Appeals for the District of Columbia, which court shall hear and determine the question in a summary way. In every such case the defendant or defendants shall have the right to be heard in the United States Court of Appeals for the District of Columbia. The decision of such court shall be final.

ARGUMENT

I. When Congress enacted the "District of Columbia Law Enforcement Act of 1953" it clearly intended that prosecutions for disorderly conduct in violation of 22 D.C. Code §§ 1107 and 1121 be conducted by the Corporation Counsel in the name of and for the benefit of the District of Columbia.

a. Legislative History

On July 29, 1892, Congress passed an "Act for the Preservation of the Public Peace and the Protection of Property Within the District of Columbia,"[1/] wherein eighteen substantive offenses were enumerated. Sections 5 and 6 of the Act proscribed the type of disorderly conduct involved in this case and provided that violations would be punishable by a fine of $25. Section 18 of the same statute provided that all prosecutions for violations of the enumerated offenses "be conducted in the name of and for the benefit of the District of Columbia," and was subsequently codified in 22 D.C. Code § 109. In 1898,[2/] Sections 5 and 6 of the 1892 Act were merged into one section which was subsequently codified in 22 D.C. Code § 1107.

In 1901, the present Code of Laws of the District of Columbia was adopted and Congress included therein a provision to

1/ 27 Stat. 322 (1892).

2/ 30 Stat. 723 (1898). There were some substantive amendments which are not here pertinent.

the effect that "all acts of Congress * * * in force at the time of the passage of this act shall remain in force" unless inconsistent with or replaced by that Code. 3/ The Code contained no provision inconsistent with or in any way repealing or amending the 1892 Act. Thus it remained in full force and effect.

Another section of the 1901 Code (Section 932) provided that:

> Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the city solicitor 4/, or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney for the United States for the District of Columbia or his assistants. 5/

now appears as 23-101

This Section has been construed to mean that where the maximum punishment permitted by statute is both fine and imprisonment, prosecution should be brought in the name of the United States by the United States Attorney. District of Columbia v. Simpson, 40 App. D.C. 498 (1913); Smith, et al., v. District of Columbia, D.C. Cir. No. 20279, decided July 27, 1967.

On June 29, ~~1953,~~ Congress enacted the "District of Columbia Law Enforcement Act of 1953." 6/ Section 211(a) of this

3/ Section 1, 31 Stat. 1189 (1901).

4/ A 1902 amendment changed the words "city solicitor" to "corporation counsel." 32 Stat. 537 (1902).

5/ 31 Stat. 1340, now 23 D.C. Code § 101.

6/ 67 Stat. 90 (1953).

Act created a new category of disorderly conduct proscriptions and provided that violators would be "fined not more than $250 or imprisoned not more than ninety days, or both."[7] Section 211(b) of the same Act amended Section 18 of the Act of 1892 by bringing the newly created proscriptions of Section 211 of the 1953 Act within the provisions of Section 18.[8] Section 210 of the 1953 statute amended Section 6 of the 1892 Act by increasing the penalties for violations thereunder to a fine of not more than $250 or imprisonment of not more than ninety days, or both.[9]

b. Legislative Intent

In passing the "District of Columbia Law Enforcement Act of 1953" Congress intended, inter alia, to strengthen the existing disorderly conduct law and create an even greater category of proscribed disorderly acts. This is readily apparent on the face of those portions of the Act dealing with disorderly conduct. By increasing the penalties to include a fine, imprisonment, or both, for violations of the already existing disorderly statute[10] and creating a new disorderly statute with similar penalties,[11] Congress obviously sought to establish a meaningful deterrent to such conduct.

7/ 67 Stat. 98 (1953). Codified in 22 D.C. Code 1121.

8/ Codified in 22 D.C. Code § 109.

9/ Codified in 22 D.C. Code § 1107.

10/ 22 D.C. Code § 1107.

11/ 22 D.C. Code § 1121.

It is presumed that whenever the legislature enacts a new statutory provision it is cognizant of the existence of all legislative policy embodied in prior Acts. Accordingly, construction of the 1953 statute together with the original Act of 1892 leads to the conclusion that prosecution of the disorderly conduct dealt with in both Acts is within the jurisdiction of the Corporation Counsel. However it is argued by the defendants below that Section 932 of the 1901 Code[12] with its mandate concerning offenses entailing a maximum punishment of both fine and imprisonment requires that violations of Section 1107 disorderly conduct be prosecuted by the United States Attorney. Congress, too, was apparently aware of Section 932 and displayed its awareness when it specifically excepted prosecutions arising under the newly created disorderly statute from the Section 932 mandate and thereby vested prosecutorial authority in the Corporation Counsel.[13] Defendants argue, however, and it is suggested by way of dictum in Smith, et al. v. District of Columbia, supra, that Congress failed to exempt disorderly prosecutions under 22 D.C. Code § 1107, as amended, from the requirements of Section 932. In weighing the effect of the 1953 amendment of Section 1107, it must be borne in mind that the Corporation Counsel had been specifically charged with the prosecution of the offense by Section 18 of the 1892 Act.

12/ 23 D.C. Code § 101.

13/ See Section 211(b) of the Act of 1953, 67 Stat. 98 (1953). Codified in 22 D.C. Code § 109.

this is all the D has to rely on.

Congress is presumed to intend to achieve a consistent body of law,[14] and in the absence of an expressed intention on the part of Congress that prosecution should shift to the United States or total legislative silence regarding prosecutive authority, it cannot be presumed that by increasing the penalty for disorderly conduct under Section 1107, it thereby intended to effectuate a change of the existing law which vested prosecution in the District of Columbia. Since it is apparent that 22 D.C. Code § 109 encompasses the substantive provisions of the 1892 Act, which, of course, include disorderly conduct as codified in 22 D.C. Code § 1107, there was no need for Congress to redundantly vest the Corporation Counsel with prosecutive authority it already had.[15] It is significant that when Congress created the new disorderly conduct statute in 1953,[16] it specifically provided that the Corporation

14/ Sutherland, Statutory Construction, Sec. 2002 (3rd Ed. 1943).

15/ 22 D.C. Code § 109 provides, in pertinent part:

> "All prosecutions for violations of Section 22-1121 or any of the provisions of any of the laws or ordinances provided for by this Act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District."

"[T]his Act" clearly refers to the Act of 1892. See Smith, et al. v. District of Columbia, supra.

16/ 22 D.C. Code 1121.

Counsel be the prosecutor for violations thereunder.[17] Congress thereby recognized that the offense of disorderly conduct is in the category of minor offenses, prosecution of which has been traditionally under the jurisdiction of the Corporation Counsel. Congress declared, in effect, that notwithstanding the penalties now provided for violations of the newly created and amended disorderly statutes, the Corporation Counsel should be the prosecutor.

The question of prosecutorial authority is not new in the District of Columbia. In a related but distinguishable situation, this Court, in United States v. Strothers, 97 U.S. App. D.C. 63, 228 F.2d 34 (1955), ruled that the United States Attorney was the proper prosecuting authority for the offense of soliciting prostitution, which was originally proscribed by Section 7 of the 1892 Act. Until 1935, the Corporation Counsel prosecuted the offense. In 1935, Congress repealed Section 7 of the 1892 Act, broadened the proscriptions against prostitution and increased the penalty thereunder to a maximum fine of $100 or imprisonment for not more than ninety days, or both.[18] After the passage of the 1935 Act violations thereunder were conducted by the United States Attorney in accordance with 23 D.C. Code § 101. In 1953 Congress increased the penalty for violation of the 1953 soliciting

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17/ Since Section 18 of the 1892 Act did not apply, specific statutory exemption from the mandate of 23 D.C. Code § 101 was necessary.

18/ 49 Stat. 651 (1935).

statute.[19] This Court, noting that the 1935 Act repealed Section 7 of the 1892 Act, declared that had Congress intended that the Corporation Counsel prosecute the soliciting offense, notwithstanding 22 D.C. Code § 101, it would have so indicated in the 1953 Act as it did "with respect to proper prosecution of the offense of disorderly conduct."[20] In District of Columbia v. Moody, 113 U.S. App. D.C. 67, 304 F.2d 943 (1962), the same controversy was presented to this Court and there involved the offense of destroying property which was created by Section 1 of the Act of 1892.[21] A subsequent amendment increased the penalty for violations of Section 1 to include a fine, imprisonment, or both.[22] Congress was silent regarding the issue of prosecutive authority. Again, this Court ruled that 22 D.C. Code § 101 was controlling and that the United States Attorney should be the prosecutor.

The common denominator apparent in the legislative facts in Strothers and Moody is the absence in the respective repealing

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19/ 67 Stat. 92, 93 (1953). This, of course, is the same Act that dealt with the disorderly conduct provisions here in issue.

20/ United States v. Strothers, supra at 66, 228 F.2d at 37.

21/ Codified in 22 D.C. Code § 3112.

22/ 34 Stat. 126 (1906).

and amending legislation of any specific provision with respect to prosecutive authority. Thus, this Court reasoned in each case that Congress intended that the more general provision regarding prosecutive authority [23] should prevail. [24] However, Congress was not silent in this regard when it amended 22 D.C. Code § 1107. On the same day that it amended Section 1107 by increasing the penalties thereunder, Congress enacted a new and additional disorderly statute [25] with similar penalties and expressed also its intention that the Corporation Counsel be the prosecutor. This Court acknowledged the obvious intent of Congress regarding prosecutive authority when it stated in Strothers, supra at 66, 228 F.2d at 37:

> What Congress did in this respect is to be found in Section 211 of the 1953 Act, which directly amends Section 18 of the 1892 Act with respect to proper prosecution of the offense of disorderly conduct. (Emphasis added.)

"[T]he offense of disorderly conduct" clearly encompasses the proscriptions found in Sections 1121 and 1107. A contrary legislative intent would be inconceivable. — I agree

23/ 23 D.C. Code § 101.

24/ In short, we do not believe that this Court in Strothers meant to rule out means other than repeal whereby Congress could effect a shift in prosecutive authority. An amendment of existing legislation with accompanying silence with respect to prosecutive authority could cause the same result, as it did in Moody.

25/ 22 D.C. Code § 1121.

II. Practical considerations make inescapable the conclusion that the Corporation Counsel is the proper prosecuting authority for violations of 22 D.C.Code § 1107.

The offense here in question has been prosecuted by the Corporation Counsel for the last seventy-five years. After the adoption of the 1953 Act, the prosecuting officials concerned interpreted the statutory scheme as continuing to vest authority in the Corporation Counsel to prosecute in the field of disorderly conduct. The construction placed upon a statute by the officials charged with its administration is entitled to considerable weight. Sutherland, Statutory Construction, Sec. 5103 (3d Ed. 1943). We note that the compilers of the District of Columbia Code have throughout the years arrived at the same conclusion as to the officials charged with prosecution. The recent 1967 edition of the Code lists Section 1107 as one of the sections prosecution for violations of which "shall be conducted in the name of and for the benefit of the District of Columbia," and the compiler lists that section very pointedly in his notes. See 22 D.C. Code § 109.

The subject matter of the statute is another aid in determining the proper prosecutor. The offense in question is of that category of minor offenses, prosecution of which traditionally has been under the jurisdiction of the Corporation Counsel.

CONCLUSION

WHEREFORE, it is respectfully submitted that prosecutions for violations of 22 D.C. Code § 1107 should be conducted by the Corporation Counsel, in the name of and for the benefit of the District of Columbia.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been mailed to Corporation Counsel and Frank D. Reeves, Esquire, Howard University Law School, Post Office Box 1121, Washington, D. C. 20001, this 9th day of October, 1967.

/s/ LAWRENCE LIPPE
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